1992

Patricia J. Kirberg v. West One Bank : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

PATRICIA J. KIRBERG,	:	
Plaintiff/Appellant,	:	
vs.	:	No. 920706-CA
WEST ONE BANK,	:	Category ~~16~~ 15
Defendant/Appellee.	:	

BRIEF OF APPELLEE WEST ONE BANK

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE FRANK G. NOEL

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

PATRICIA J. KIRBERG, Plaintiff/Appellant, vs. WEST ONE BANK, Defendant/Appellee.	:	No. 920706-CA Category 15

DETERMINATIVE AUTHORITY

There are no constitutional provisions, statutes, ordinances, rules, or regulations whose interpretation is determinative of this appeal.

STATEMENT OF CASE

This is an appeal from an order granting the Motion for Summary Judgment of defendant West One Bank ("West One") on the breach of implied contract claim of plaintiff Patricia J. Kirberg ("Kirberg"). In support of its motion for summary judgment, West One relied upon the express statement of at will employment and disclaimer of contractual intent found in its employment application, its Human Resource Manual and a booklet distributed to all employees entitled "Code of Conduct." West One argued that the conduct which Kirberg alleged created an implied contract that she could be fired only for cause was insufficient to overcome West One's express disclaimers. The district court granted West One's motion, holding that the disclaimer found in the application, Manual and Code of Conduct were in effect throughout Kirberg's employment, and that the conduct on which Kirberg relied was insufficient to overcome the disclaimer.[1]

STATEMENT OF FACTS

Kirberg was employed by West One from October 1988 until February 1991. R. 041. From February 1989 until her termination Kirberg was the branch manager of the West Jordan branch. Id. Beginning in early 1990, West One's loan procedures provided that retail branches were to take loan applications and obtain all necessary information from the potential customer, but all

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[1]Kirberg's complaint also sought punitive damages. At the hearing on the motion for summary judgment Kirberg's counsel stipulated to the dismissal of the punitive damage claim and does not seek reinstatement of that claim on appeal.

applications and information were then forwarded to, and loan decisions made by, loan officers in the installment loan department or the commercial loan department. R. 042. Branch personnel were expected to pass all relevant information regarding a loan applicant to the appropriate loan department. Id.[2]

In approximately June 1990, Kirberg obtained a completed loan application and other required information from Dr. Robert Davis, a new bank customer. Kirberg passed the application and information to the installment loan department, which granted Davis the loan. Thereafter, Davis opened several accounts at the West Jordan branch, and applied for and received another loan through the installment loan department. R. 042-043. In mid November 1990, Kirberg learned that some time in the past Davis had been barred from receiving reimbursement from federal medical insurance programs, had been charged with rape, and that numerous patients had complained about overcharging. R. 044. Following her receipt of this information, Kirberg again sent the installment loan department an application from Davis for another loan. Kirberg did not tell the loan officer in charge of the Davis loan about his previous legal problems. Davis was granted the loan. R. 043-044.

West One did not learn of Davis' previous legal problems until January 1991. After Kirberg had referred Davis to Tim Conklin, a

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[2]While Kirberg was a branch manager, branch performance was evaluated in part on the basis of the amount and growth of deposits and on the number and size of installment loans referred to the installment loan department by the branch. Branch managers were paid incentives based on the performance of their branch. R. 043-44.

commercial loan officer, in connection with a fourth loan, she learned from her daughter, who had been employed by Davis since mid-November 1990, that an FBI agent was in Davis' office looking at files. R. 044, 071. Kirberg then called Conklin and told him to proceed cautiously with the loan. Id. Following this telephone call from Kirberg, Conklin learned through an independent source of numerous charges against Davis, including a pending rape charge, numerous violations of Department of Professional Licensing regulations and that Davis was barred from receiving reimbursement through federal medical insurance programs because of previous violations of program regulations. R. 045. Thereafter, Kirberg was terminated for failing to pass information relevant to a pending loan applicant to the loan officer making the decision on the loan. R. 046, 072.[3]

When Kirberg initially applied for employment with the bank she filled out an employment application, which stated that any employment with the bank would be at will.[4] Kirberg argues that

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[3]Kirberg states in her brief that she was terminated after West One confirmed that Davis was being investigated by the FBI. Appellant's Brief at 7. In fact, West One never learned one way or another whether Davis was investigated by the FBI. See infra at 15. Kirberg was terminated after West One learned that she was aware of Davis' legal problems at the time he sought a loan but did not pass that information to the appropriate loan officer.

[4]The disclaimer in its entirety read:

> I understand and agree that if I am employed by Moore Financial Group [the predecessor of West One] or any of its related companies or subsidiaries (the "company"), that I may resign or be discharged at any time without notice and without cause. I understand no company representative has any authority to enter into an agreement with me different or

(continued...)

the disclaimer on the West One application form was in "fine print" and that she did not read it. Appellant's Brief at 3. However, the disclaimer, which is in the same print as all other writing on the form, is written as a certification by the applicant that he or she understands these are the terms under which any offer of employment is made, and the applicant signs the form just below the disclaimer. R. 105; 118; Appellant's Addendum at V. Kirberg signed the application she filled out, acknowledging her acceptance of the terms of her employment. Id.

West One's intent to maintain an at will employment relationship was expressed in two additional documents of which Kirberg was aware but her brief ignores. Throughout Kirberg's employment, the West One Human Resource Manual ("Manual"), to which Kirberg had access, expressly adopted an at will employment relationship and disclaimed any intent to create a contract. R. 046-047. The Manual stated:

> Adherence to the policies and guidelines contained in this Code of Conduct [within the Manual] do not constitute an expressed or implied employment contract between the Company and its employees. All employees may resign or be discharged at any time without notice and without cause. No West One representative has any authority to enter into an agreement with any West One employee contrary to the foregoing.

R. 059.

During 1990, portions of the Manual, including the provision set forth above were incorporated into a separate booklet titled

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[4](...continued)
contrary to the foregoing. I also understand that if I accept employment, there is no express or implied employment contract between me and the company.

"Code of Conduct" which was distributed to all employees. Kirberg received a copy of the Code of Conduct, and signed a statement acknowledging that she had read it. R. 047. Furthermore, as branch manager, she was told that she and all employees were to become familiar with the booklet. Id.

While the Manual also contained a discipline policy, contrary to Kirberg's allegation, that policy does not require progressive discipline. The discipline policy outlines a range of possible alternative responses in any given discipline situation and requires documentation of the discipline imposed.[5] The policy does

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[5]The discipline policy states:

> CORPORATE POLICY
>
> Employees of Moore Financial Group whose job performance or conduct is substandard or who violate corporate or affiliate policies, practices, or regulations are subject to disciplinary action. Depending on the severity of the problem, disciplinary action may result in progressive discipline, a negotiated voluntary separation, or immediate involuntary separation.
>
> The company encourages harmonious working relationships among supervisors and employees. If possible, problems should be resolved on an informal basis. If more serious action is appropriate, the following disciplinary actions should be considered.
>
> - Supervisory counseling
> - Verbal warning
> - Written reprimand
> - Probation
> - Suspension
> - Dismissal
>
> Written documentation of the problem and the actions taken to correct it are helpful as a basis for avoiding misunderstanding of the issues involved, establishing a record of corrective action agreed upon, and knowing if the problem has been resolved or if more progressive

(continued...)

not state or require that the alternative sanctions listed be imposed in a sequential fashion. R. 061.

SUMMARY OF ARGUMENT

Kirberg was an at will employee of West One; she could be terminated at any time without notice and without cause. Kirberg has failed to allege facts sufficient to modify her expressly at will relationship with West One. The district court's order granting West One summary judgment should therefore be affirmed.

Moreover, even if this Court were to find that an implied contract requiring termination only for cause existed, as a matter of law Kirberg was terminated for cause. Because this Court may affirm on any ground, it may affirm the lower court's order on the basis that West One had cause to terminate Kirberg.

ARGUMENT

I. KIRBERG CANNOT ESTABLISH A MODIFICATION OF HER AT WILL EMPLOYMENT AGREEMENT WITH WEST ONE

Kirberg acknowledges that her initial employment relationship with West One was at will, but argues that the at will relationship

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[5](...continued)
disciplinary action is appropriate. Documentation is also helpful as a basis for fair and honest performance evaluations.

CORPORATE GUIDELINES

All forms of disciplinary action, be they counseling sessions, verbal warnings, reprimands, probation, suspension and-or dismissals should be documented by the immediate supervisor. Contact your appropriate Human Resource department for assistance in carrying through disciplinary action.

R. 061.

was modified by later conduct, which created an implied in fact contract that she could be fired only for cause. Although Johnson v. Morton Thiokol, 818 P.2d 997 (Utah 1981), holds that express statements adopting an at will employment relationship like those made by West One may be subsequently modified by statements or conduct, Kirberg's allegations, even if true, are insufficient to establish a modification of the at will relationship.

To establish a modification of West One's express adoption of an at will employment relationship, Kirberg must show a clear manifestation of West One's intent to change the relationship, which was communicated to her in a manner sufficiently definite to operate as a contract. Hodgson v. Bunzl Utah, Inc., 202 Utah Adv. Rpt. 22, 24 (Utah 1992); Johnson, 818 P.2d at 1002. Moreover, the manifestation of the employer's intent must be of such a nature that the employee can reasonably believe that the employer is making an offer of employment other than employment at will. Id.

Under the above principle, establishment of an implied contract where an express disclaimer exists requires unambiguous conduct and/or express statements which are strong enough to overcome the presumption of at will employment and the inconsistent language of the disclaimer. Hodgson, 202 Utah Adv. Rep. at 23. In the absence of direct expressions of intent, it is not reasonable for the employee to believe the employer is making an offer of employment other than at will given the earlier disclaimer. See Id. at 23-24.

Kirberg argues that West One's express intent to adopt an at will relationship with its employee is overcome by West One's statements and conduct indicating that bank employees would not be terminated except for cause. While Kirberg's brief alludes to express statements that bank employees would not be terminated except for cause, the record is devoid of any evidence of such statements. Instead, Kirberg's claim of implied contract rests on the following factual allegations:

> 7. I was given a Human Resource Policy Manual, to use in employee matters involving employees under me.
>
> * * * * *
>
> 8. The Human Resource Policy Manual sets forth a system of progressive steps of employee discipline, including supervisory counseling, verbal warning, written reprimand, probation, suspension and dismissal.
>
> 9. The Manual advises that the severity of the problem is related to the degree of discipline. The understanding I drew from the Manual, the employee discipline practices I observed, and the advice and training I received as a branch manager was that the discipline should be at the lightest (least) level necessary to correct the problem.
>
> 10. Further, I understood, and was trained, that an employee's problems needed to be fully documented or proved before they could be disciplined, to justify the severity of any action taken.
>
> 11. It was my understanding from the practices I observed, and I was taught, that an employee was not fired arbitrarily or without cause. I cannot think of a single instance where this happened.

R. 094-095.

In essence, Kirberg's claim rests on 1) her assertion that another section of the Manual suggests a system of progressive discipline; 2) her training by West One to document problems prior to imposing discipline and to impose discipline appropriate to the

offense; and 3) her observation of other disciplinary situations, including two specific occasions when she wanted to dismiss an employee for poor judgment or poor performance but was denied approval by her supervisor and told she must first counsel the employee. R. 095.

The discipline policy in the Manual is insufficient to establish an implied contract requiring termination for cause because by its own terms, it does not require any form of progressive discipline. It simply lists a variety of possible discipline sanctions. More importantly, Johnson unequivocally holds that where a handbook or manual contains clear and conspicuous language disclaiming any contractual intent, as a matter of law no other part of the manual may be used to create an implied contract modifying the at will employment relationship.[6]

Kirberg's allegations regarding her training and observation of other disciplinary situations are also insufficient to overcome West One's expressed intent to maintain an at will employment relationship. First, West One's intent that the employment relationship remain at will was affirmed both in the Manual, made available to Kirberg in 1989 when she became branch manager, and in

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[6]Kirberg attempts to circumvent Johnson by arguing that whether or not the discipline policy legally restricted termination, West One abided by the policy and therefore restricted its right to terminate. However, if the policy itself does not establish an implied contract in light of the disclaimer, adherence to the policy does not alter the at will relationship. 818 P.2d at 1004.

the Code of Conduct, distributed to all employees in early 1990.[7] Kirberg does not state whether the incidents on which she relies, including the occasions when she was not permitted to fire employees, occurred before or after early 1990. Any conduct occurring before that time is irrelevant. Johnson, 818 P.2d at 1004, n.29 (express intent may be overcome by a subsequent implied contract (emphasis added)). Also, Kirberg's allegations regarding her attempts to terminate employees, even if true, simply show that Kirberg did not have authority to terminate without approval, and that her supervisor did not feel termination was the appropriate action in two instances. None of these facts is relevant to the question of whether a West One manager with the authority to terminate an employee must have cause to do so. Nor are the two incidents on which Kirberg relies sufficiently clear and unambiguous to overcome West One's express intent to employ at will. Similarly, requirements of good documentation and proportionality of discipline are not inconsistent with at will employment.

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[7]Kirberg argues that she did not read the disclaimer found in the application and that it was never referred to again in her employment. This statement is misleading. As pointed out in the statement of facts, West One's disclaimer was repeated in the Manual and in the Code of Conduct. See supra pp. 4-5. When the Code of Conduct was distributed, Kirberg was expressly told to read and become familiar with its terms. R. 047. In any event, Kirberg's failure to read the disclaimer does not alter West One's intent to adopt an at will relationship. See e.g., Johnson, 818 P.2d at 1003 (disclaimer need only be clear and conspicuous to establish at will relationship). Moreover, as noted supra pp. 3-4 Kirberg's statement is inconsistent with her signature found on the application form.

What Kirberg essentially alleges is that because West One practiced good management, did not fire people arbitrarily and trained her not to fire employees arbitrarily, it created an implied in fact contract requiring just cause for dismissal. Fair treatment of employees is simply an inadequate basis on which to impose an implied in fact contract inconsistent with West One's express adoption and reaffirmation of at will employment. While at will employment allows an employer to act arbitrarily, it does not require that an employer act arbitrarily and occasionally terminate an employee for no reason at all in order to maintain its status as an at will employer. See Hodgson, 202 Utah Adv. Rep. at 24 ("No employer should be required or even expected to discharge an at-will employee for a minor infraction, even though the employer may technically have that right").

The Hodgson case demonstrates the correctness of the trial court's ruling in dismissing Kirberg's claim. In Hodgson, plaintiff was terminated without warning. Plaintiff was told in a preemployment interview that her employment was at will, and a disclaimer was found in a New Employee Checklist signed by plaintiff, and an employee handbook. However, plaintiff claimed that her at will status was modified by the employer's statements during the preemployment interview that the employer followed "disciplinary procedures," and by the employer subsequently issuing warnings to four employees regarding job performance. The district court granted summary judgment for the employer and plaintiff appealed.

On appeal, the Utah Supreme Court reaffirmed the standard for establishing an implied in fact contract set forth in Johnson and found that plaintiff's evidence was not strong enough to overcome the disclaimers found in the manual and New Employee Checklist. The Court stated:

> The warnings given to four Bunzl employees were not sufficiently definite to constitute a contract term because they were too inconsistent. The employees received probationary periods varying from ninety days to no specified period, and no guidelines existed for determining what probationary period should be prescribed for each type of misconduct.
>
> * * * * *
>
> Although Hodgson may have subjectively believed that her employment could be terminated only after a warning, the standards of unilateral offer and acceptance require that Hodgson reasonably believe the employment was other than at will and this standard has not been met.

Id. at 24.

Like the plaintiff in Hodgson, Kirberg does not and cannot allege the direct statements or clear, unambiguous conduct necessary to overcome the disclaimer found in West One's application, Manual and Code of Conduct. Kirberg's allegations are insufficient to establish an implied in fact contract as a matter of law and the trial court's grant of summary judgment should therefore be affirmed.

II. KIRBERG'S CLAIM FAILS BECAUSE SHE RELIES UPON UNAUTHORIZED STATEMENTS

Kirberg's allegations cannot establish an implied contract because the representations she claims to rely upon were made by her supervisors and the terms of West One's written disclaimer contained in the application, Manual and Code of Conduct expressly

provide that no company representative has any authority to enter into an agreement with Kirberg contrary to or different from at will employment. Thus, Kirberg's reliance on her supervisor's statements regarding discipline cannot alter the at will terms of her employment. Lane v. Terminal Freight Handling Co., 775 F. Supp. 1101, 1105 (S.D. Ohio 1991) aff'd, 944 F.2d 905 (6th Cir. 1991)(where application and other company document provided only President or Vice President of company could alter at will relationship, reliance on statements of supervisor insufficient as a matter of law to establish implied contract terms).

Kirberg argues that the foregoing provision is unenforceable, relying on Hardy v. Prudential Ins. Co. of America, 763 P.2d 761, 768 (Utah 1988), which held that an insurer could be estopped from invoking "boilerplate nonwaiver provisions if the insured reasonably relied upon the agent's representations to the contrary." (citations omitted) The Hardy case, which applied specific insurance law principles, is inapplicable in this context.

Moreover, the pertinent language here was not simply a "boilerplate" provision which Kirberg reasonably ignored in reliance on her superior's alleged comments.[8] As stated above, the disclaimer in the employment application was written as a certification by the applicant that he or she understood the limitations contained therein to be the terms under which any offer

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[8]As set forth above in more detail, West One contends that Kirberg's allegations are insufficient to vary the terms of her at will employment relationship regardless of the authority of her supervisors to vary the terms of her employment.

of employment was made, and the applicant signed the form just below the disclaimer. Kirberg signed her application, thereby acknowledging the terms of her employment. In addition, unlike Hardy, the disclaimer was contained in subsequent documents -- the Manual and Code of Conduct. Kirberg had access to the Manual beginning in 1989, and was given the Code of Conduct in early 1990 and told to become familiar with its contents. R. 046-047. Given West One's continued reiteration of its intent to maintain at will employment, Kirberg could not reasonably rely on statements of her supervisors to vary the terms of her employment.

III. KIRBERG WAS TERMINATED FOR CAUSE

On appeal, this Court may affirm the trial court's decision if it may be sustained on any proper ground. Bill Nay & Sons Excavating v. Neeley Const. Co., 677 P.2d 1120, 1123 (Utah 1984); Bagshaw v. Bagshaw, 788 P.2d 1057, 1060 (Utah App. 1990). Assuming the Court finds Kirberg could establish an implied contract requiring termination for cause, the district court's ruling should still be affirmed because as a matter of law, West One had cause to terminate Kirberg.

In the trial court, Kirberg admitted that as of November 15, 1990, she had heard that Davis was barred from receiving reimbursement from federal medical insurance programs, had been charged with rape and that numerous patients had complained about overcharging. R. 044. Following her receipt of this information, she referred at least one loan application to a loan officer but did not tell that officer about Davis' past legal problems,

criminal charges or patient complaints, even though it was West One's policy that the character of an applicant is relevant to whether a loan should be made. R. 043-044; 107. Davis in fact received a loan from West One on the November application. Kirberg did not dispute that it was her duty to convey any relevant information regarding a loan customer to the department making the loan decision. R. 042.

Kirberg argued below that her failure to convey the information she had was not sufficient cause for her termination, and that a jury could conclude Kirberg acted properly because the information was unsubstantiated rumor. However, Kirberg acknowledged that when her daughter called in January all she said was that an FBI agent was in the office; she had no other information.[9] Kirberg admitted that she did not know that the agent was there because of Davis; it could have been an employee or patient. The information she learned from her daughter in January was no more trustworthy or definitive than the "unsubstantiated rumor" Kirberg heard in November.

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[9]In an affidavit submitted in opposition to West One's Motion for Summary Judgment, Kirberg states that she called Conklin to warn him to be careful after learning that Davis was being investigated by the FBI. R. 097. However, in her deposition she stated that all she knew was that a FBI officer was in Davis' office; she had no other information. Kirberg admitted that she did not know that the agent was there because of Davis; it could have been because of an employee or patient. R. 104. Kirberg may not contradict her deposition testimony with a later affidavit. Gaw v. State By and Through Dept. of Transp., 798 P.2d 1130, 1140 (Utah App. 1990)(an affiant may not raise an issue of fact by his own affidavit which contradicts his deposition unless he provides an explanation of the discrepancy).

More importantly, Kirberg's argument misconstrues the standard for determining whether an employer had cause for termination. A discharge for just cause is "one which is not for any arbitrary, capricious, or illegal reason and one which is based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true." Baldwin v. Sisters of Providence in Washington, Inc., 769 P.2d 298, 304 (Wash. 1989); see Braun v. Alaska Com. Fishing & Agr. Bank, 816 P.2d 140, 142 (Alaska 1991) (same); see also Gardner v. Portland Gen. Elec., 767 P.2d 497, 498 (Or.App. 1989) (application of the term "willful or serious" and the sanction for employee's conduct were solely employer's decisions to make).

For example, in Braun, the employee was discharged for economic reasons. The employee brought an action alleging just cause was required for termination and his termination was not for just cause. The appellate court upheld the district court's grant of summary judgment in favor of the employer, holding that evidence of the employer's good faith belief that the economic situation required plaintiff's termination proved good cause as a matter of law. 816 P. 2d at 142-43.

In Baldwin, plaintiff was terminated by his hospital employer because of allegations of sexual abuse of a patient. The jury found for plaintiff. On appeal, the court overturned the verdict, finding that the jury had been improperly instructed on the burden of proof. The appellate court also held that the hospital did not have to be right, but only reasonable in its belief that the abuse

had occurred. As the court noted in Baldwin, "an employer's agreement to restrict discharges to those supported by just cause should not be followed by a further judicial implication which takes the determination of just cause away from the employer." 769 P.2d at 304.

A holding that the factfinder may second guess an employer's determination of just cause would be unduly restrictive, and would deny an employer the right to determine the standards of conduct that it believes its employees must meet. Moreover, it would allow every employee terminated under a for cause restriction to challenge his or her termination before a jury. See Gilbert v. Tektronix, Inc., 827 P.2d 919, 921 (Or. App. 1992) (Plaintiff's implied contract claim dismissed where he provided no evidence of bad faith, but simply disagreed with the defendant's decision to terminate him).

Thus, the question here is not whether the trial court, this Court, or a jury believe that termination was the appropriate sanction for Kirberg's conduct, but whether West One's decision to terminate Kirberg was supported by substantial evidence which West One reasonably believed to be true and was not made for an arbitrary reason. There is no question that West One's decision to terminate Kirberg was based on substantial evidence, reasonably believed by West One. Kirberg herself admits that she submitted at least one loan application for Davis after she learned of his legal problems without revealing those problems. Kirberg did not argue that West One's decision was based on an arbitrary, capricious or

illegal reason, but simply that in her judgment her actions did not warrant the sanction of termination. That Kirberg, or a jury might apply another sanction is irrelevant. West One had just cause to terminate Kirberg, and the district court's order should be upheld.

CONCLUSION

Kirberg argues that to affirm the district court's order would allow employers to use promises of job security to encourage employee loyalty while providing themselves an out through the use of a "small print" disclaimer. Kirberg's argument simply does not fit the facts before the court.

Kirberg's allegations are not sufficiently definite to create an implied in fact contract in light of West One's express adoption of an at will employment relationship. The fact that until her own termination Kirberg thought West One treated its employees fairly is not inconsistent with an at will employment relationship. In addition, Kirberg's claim of implied contract was correctly dismissed because it rested on comments she knew to be unauthorized. Finally, even if Kirberg could establish an implied contract requiring just cause for termination, West One had cause to terminate her. The lower court's order should be affirmed.

DATED this 19th day of January, 1993.

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of and/or employed by the law firm of WATKISS DUNNING & WATKISS, Broadway Centre, Suite 800, 111 East Broadway, Salt Lake City, Utah, and that in said capacity and pursuant to Rule 21(d), Rules of the Utah Code of Appeals, four copies of **BRIEF OF APPELLEE WEST ONE BANK** were served upon the following:

Daniel F. Bertch
3540 South 4000 West, Suite 100
West Valley City, Utah 84120

by depositing the same in the U. S. mail, postage prepaid, this 19th day of January, 1993.

Carolyn Cox